BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL J. MARKS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,028,497
CLASS LTD.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the October 31, 2011, Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Workers Compensation Board heard oral argument on February 17, 2012, in Wichita, Kansas.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

In the October 31, 2011, Award, ALJ Klein denied claimant workers compensation benefits after finding claimant was not in the course of his employment when he was injured.

Claimant contends he has proven his injury arose out of and in the course of his employment with respondent. Claimant requests the Board reverse the findings of the ALJ, find claimant sustained accidental injury arising out of and in the course of his employment

with respondent, and remand this claim to the ALJ to make findings on the remaining issues.

Respondent argues claimant's injuries did not arise out of or in the course of his employment with respondent. It asserts that claimant was injured while he was on a personal errand. Respondent requests the Board affirm the Award.

The issue to be resolved by this appeal is whether the claimant's injury arose out of and in the course of his employment with respondent.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant was employed as a coach for a mentally disabled gentleman, Mr. Jacobs, who was in his early 60s on the date of claimant's work-related accident. This job required claimant to work a split shift, arriving at 7:00 a.m. to awaken Mr. Jacobs and get him prepared to go to the workshop at 9:00 a.m. The claimant would return at 3:00 p.m. and stay with Mr. Jacobs until 9:00 p.m., helping him to prepare for supper and bed. Included in this job was the freedom to shop for groceries, attend social events and participate in other activities in the hopes of integrating Mr. Jacobs into society. When asked the overall purpose of his job, claimant indicated it was to get Mr. Jacobs into the community and teach him the activities of daily living. Claimant testified that having a client perform chores at a group home, the client's home, out in public, for a third party or around the coach's house was part of his job as a coach.

Based upon the evidence in the record, it appears that the selection of activities was governed by claimant, although Mr. Jacobs may have made suggestions. Claimant had the final decision as to what constituted a safe activity for Mr. Jacobs to engage in. Claimant testified that Mr. Jacobs enjoyed his friendship and, as a result, claimant would often include Mr. Jacobs in dinners with his family and allowed Mr. Jacobs to play with his dog, attend local basketball and football games and once even trick-or-treating at claimant's brother's house. A log was kept at Mr. Jacobs' residence in which claimant would write down the activities the two did on any given day.

On December 22, 2005, claimant was at Mr. Jacobs' residence and Mr. Jacobs' stepmother, Ms. Jacobs, called. Ms. Jacobs has been the stepmother of Mr. Jacobs since he was nine years old and is his guardian. She had planned to pick up Mr. Jacobs that evening around 9:00 p.m. and take him home for the holidays. Claimant advised Ms. Jacobs that Mr. Jacobs had gone elsewhere with friends and would not be home until after 10:00 p.m. The two agreed that she would call claimant in the morning on his cell phone and the two would arrange a meeting so that she could take Mr. Jacobs. Claimant had apparently planned to take Mr. Jacobs with him on some errands and he told

Mr. Jacobs' stepmother the two would be at the lumberyard or at his house. According to claimant, Mr. Jacobs' stepmother expressed no objection to this plan.

In late October 2005, a house owned by claimant was partially destroyed in a fire. Claimant was in the process of repairing the roof, and on December 23, 2005, he went to Mr. Jacobs' residence at 7:00 a.m. and then took him to the lumberyard. At the regular hearing, claimant testified that this was not Mr. Jacobs' typical routine, as there was no workshop scheduled that day. After going to the lumberyard they went to the house and waited for the materials to be delivered. This activity was, in claimant's view, another attempt to incorporate Mr. Jacobs into normal social activities.

There was no roof on the house and it was covered with plastic to keep the rain out. It was claimant's intent to build a frame for a new roof using two-by-eight boards. Claimant was not going to start on the roof until he was off work at 9:00 a.m. At the regular hearing, claimant acknowledged he could have waited to go to the lumberyard until after Mr. Jacobs was picked up by his stepmother. Claimant admitted that part of the reason he and Mr. Jacobs went to the house was so claimant could tell the lumberyard where to place the materials.

According to claimant, Mr. Jacobs had been ". . . bugging me wanting to go over there and actually help me with the work."[1] At the preliminary hearing claimant testified that he had taken Mr. Jacobs to this house before, doing "other little chores for me and stuff like that, raking and stuff like that."[2] When asked if he made Mr. Jacobs do this work claimant responded, "No, he wanted to. That's what he wanted to do, was help me."[3] He was then asked:

> Q. (Mr. Phalen) Okay, now in his mind was he actually helping?
>
> A. (Claimant) Oh yes.
>
> Q. In your mind was he actually helping?
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> A. Well, yeah, he was doing stuff that I didn't have to do if he did it so he was helping.[4]

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[1] Marks Depo. (Apr. 25, 2011) at 16.

[2] P.H. Trans. at 45.

[3] *Id.*, at 18.

[4] *Id.*

At the regular hearing, claimant testified Mr. Jacobs had previously been at claimant's house two to four times. Claimant indicated that on those prior occasions, he did not have Mr. Jacobs perform any activities around the house.

While claimant was at the house on December 23, 2005, he "set him [Mr. Jacobs] up with some stuff he could do, like he was picking up scraps of lumber."[5] Claimant characterizes this activity as something that filled time until Mr. Jacobs' stepmother came to pick him up. Claimant's fall occurred while he and Mr. Jacobs were waiting for the lumberyard to deliver the materials.

Claimant described the accident as follows:

> I stepped out of a window. There was a broken window there with a piece of plastic over it and it was a window I was going to be using later in the day for entry so I took a piece of plastic off it and I took a board off and was going to throw it on the floor and give him something else to pick up because basically there wasn't a whole lot of pick up to be done and I was trying to keep him busy where he thought he was helping, you know, give him something to do and the ladder slipped out from underneath me and I broke my leg and [Mr. Jacobs] came, you know, right to me and was concerned with me and was helping, you know, trying to help me.[6]

At a May 19, 2006, deposition, claimant testified the window was going to be used as an access point to the porch roof when the lumber arrived.[7] Mr. Jacobs was picking up items inside the room with the window. Claimant pulled a board and some of the plastic off the window in order to access the roof. He stepped through the window and started up the ladder to remove plastic from the top of the window. Claimant slipped on the ladder and fell onto the porch roof. He testified at the regular hearing that the plastic did not have to be pulled from the window in order to repair the house. Claimant was going to pull off the plastic so that Mr. Jacobs would have something to pick up. However, claimant also testified that he was removing the plastic so he would have access to the roof. After Mr. Jacobs left, claimant was going to work on the roof.

After falling from the ladder, claimant used his cell phone to call his brother. Claimant's brother arrived at the house a short time later and with the assistance of Mr. Jacobs, helped claimant from the roof. While claimant was waiting for his brother to arrive, he coincidentally received a call from his supervisor, Aaron Martinez, who was a team leader for respondent in December 2005. Mr. Martinez was checking in to make sure claimant was with Mr. Jacobs. Claimant advised he was with Mr. Jacobs, but that he

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[5] *Id.*, at 26.

[6] *Id.*, at 27.

[7] Marks Depo. (May 19, 2006) at 29.

(claimant) was injured. The phone call was cut short and no further information was exchanged.

Approximately a week after the accident, the facts and circumstances surrounding claimant's accident began coming to light. Respondent terminated claimant's employment and reported him for suspected neglect. According to claimant, he was terminated for having a client at his house without his supervisor's knowledge and for leaving him in the house while he was on the roof of his house.[8]

Aaron Martinez testified that on the morning of December 22, 2005, he called Mr. Jacobs' stepmother to inquire if she would be coming to pick him up for the holiday vacation. Mr. Martinez stated that on December 23, 2005, he was calling around to make sure that all of respondent's clients were being taken care of. He also wanted to make sure that claimant knew Mr. Jacobs' stepmother was coming and to make sure claimant had made arrangements to cover Mr. Jacobs' paper route. When Mr. Martinez reached claimant on his cell phone, he learned that claimant had fallen and broken his leg. The subject of Mr. Jacobs never came up, presumably because of the news of claimant's accident. At this point Mr. Martinez did not know claimant was at his house.

Mr. Martinez testified that he was not aware that Mr. Jacobs had been doing work at claimant's house and it was not recorded in the logs. Mr. Martinez testified that coaches, such as claimant, do not need permission to take a client out in the community as it is the coach's job to help the clients assimilate into the community. He further testified that it is the client and/or the client's guardian who usually decide what activities are appropriate. According to Mr. Martinez, he was told by Mr. Jacobs that he did not like to work at claimant's house.

Mark Newbold, director of human resources for the respondent, testified that claimant's accident was treated as a non-work injury. A week later, claimant inquired about workers compensation. Only later did respondent become aware that Mr. Jacobs was with claimant at the time of claimant's injury. This caused respondent to investigate whether Mr. Jacobs was being neglected and/or exploited. After obtaining numerous statements it was determined that it would be best to terminate claimant's employment.

Mr. Newbold testified that federal guidelines require clients to be paid the minimum wage. Respondent has a specific guideline that if a client works for an employee or board member of respondent, that client is to be remunerated for that work. Mr. Newbold testified the purpose of the guideline is to insure that staff and board members do not take advantage of clients. He also testified it is okay for a client to work for one of respondent's employees, so long as the case manager preapproves and the client is paid the minimum wage. This is in respondent's written personnel policy.

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[8] P.H. Trans. at 30.

At the preliminary hearing, claimant requested medical treatment, payment of temporary total disability benefits, and that respondent pay claimant's medical bills. The ALJ found claimant did not sustain a personal injury by accident arising out of and in the course of his employment with respondent and denied claimant's request. Claimant appealed and a Board Member affirmed the ALJ's preliminary order, stating, "The Board agrees with the respondent's contention that this was a personal business errand, a deviation from his normal work duties and therefore, claimant's injury did not arise out of *and* in the course of his employment with respondent."[9]

Claimant testified at the regular hearing that he was investigated by the State of Kansas for wrongdoing and had been cleared. He applied for unemployment benefits and was initially denied. Claimant appealed and was awarded unemployment benefits. He testified that it was determined that there was no just cause for his termination.

Claimant took the deposition of Jerry Wilson, former assistant county service director for respondent. Mr. Wilson was employed by respondent when claimant was, but left respondent's employment before claimant's accident. He testified claimant's position with respondent was a coach. Mr. Wilson testified extensively on the job duties of a coach. He indicated coaches were matched up with clients that had similar interests and were encouraged to get clients out in the community. Coaches were permitted to take clients to their homes and clients were allowed to do work and perform chores in the homes of coaches. Mr. Wilson said it would be an accepted practice to let Mr. Jacobs go to claimant's home and work around the house.

Upon cross-examination, Mr. Wilson admitted he did not know what respondent's policies were on December 23, 2005, as he left respondent's employment on August 4, 2005. He testified that when a client was at a coach's home, the coach was supposed to take care of the client. Mr. Wilson testified it would not be wise for claimant to perform a job while allowing Mr. Jacobs to perform an unsupervised job. Mr. Wilson testified claimant was a good coach.

Claimant deposed Ms. Jacobs, Mr. Jacobs' stepmother and guardian. She testified that Mr. Jacobs had gone to claimant's house and homes of other employees of respondent. Mr. Jacobs would tell his stepmother about working at some, but not all, of their homes. Mr. Jacobs told his stepmother that he was working on claimant's house, but did not say what he was doing. She had no problem with Mr. Jacobs going to claimant's house and working as long as Mr. Jacobs wanted to do the work and would not get hurt. Ms. Jacobs testified she would not approve of her stepson working at claimant's house if claimant could not see or watch Mr. Jacobs.

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[9] *Marks v. Class LTD,* No. 1,028,497, 2006 WL 2632040 (Kan. WCAB Aug. 2006).

On the day of claimant's accident, Ms. Jacobs called claimant to arrange to pick up Mr. Jacobs at claimant's house. Instead, she reached claimant's daughter, who answered claimant's cell phone. Claimant's daughter told Ms. Jacobs that claimant fell off his house and suffered a broken leg. Ms. Jacobs did not know what work Mr. Jacobs was performing at claimant's house on the day of the accident. Nor did Ms. Jacobs know why claimant was on the roof of his house.

On March 6, 2009, claimant filed a Notice to Take Deposition of Mr. Jacobs. Respondent subsequently filed a Motion to Quash and Notice of Hearing. A hearing on respondent's motion to quash was held on May 13, 2009. At that hearing, respondent argued that Mr. Jacobs lacked the mental capacity to testify, that a deposition would be harmful to the best interests of Mr. Jacobs, and that Mr. Jacobs' testimony was not reasonably calculated to lead to admissible evidence. The ALJ found there was no evidence, other than the representations of counsel, for the court to make a judgment on Mr. Jacobs' capacity to testify. The ALJ indicated he was applying the principles of K.S.A. 44-523 and declined to grant respondent's motion to quash.

Prior to Mr. Jacobs testifying about the incident and other matters relevant to the claim, neither the ALJ, nor the attorneys of the parties, asked Mr. Jacobs questions to determine if he was competent to testify. Claimant testified that Mr. Jacobs had the IQ of a seven-year-old child[10] and could neither read nor write.[11] Mr. Jacobs testified that he went to claimant's house on one occasion, but "[d]idn't do nothing."[12] He later testified that he never went to claimant's house that burned, despite substantial evidence to the contrary.

In his Award, the ALJ stated:

> This court finds that the claimant was not in the course of his employment when he went to his own home to conduct repairs, put a developmentally disabled person to whom he had a duty of care to work, without compensation, in furtherance of his own personal agenda. The court therefore denies the claim.[13]

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2005 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's

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[10] Marks Depo. (Apr. 25, 2011) at 16-17.

[11] P.H. Trans. at 9.

[12] Mr. Jacobs Depo. at 7.

[13] ALJ Award (Oct. 31, 2011) at 3.

right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2005 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[14] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[15]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[16]

The Board finds that claimant sustained a broken leg by accident and that claimant broke his leg in the course of his employment with respondent. However, the Board finds that claimant's broken leg did not arise out of a risk or hazard of his employment. It is undisputed that claimant broke his left leg during his shift at respondent from 7:00 a.m. to 9:00 a.m. on December 23, 2005. As the Kansas Supreme Court stated in *Kindel*, "in the course of" employment generally means the accident occurred when the employee was working in the employer's service.

In 2 *Larson's Workers' Compensation Law*, Chapter 33, it is stated:

> When misconduct involves a prohibited overstepping of the boundaries defining the *ultimate work* to be done by the claimant, the prohibited act is outside the course of employment. But when misconduct involves a violation of regulations or

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[14] K.S.A. 2005 Supp. 44-501(a).

[15] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[16] *Id.*, at 278.

> prohibitions relating to the *method* of accomplishing that ultimate work, the act remains within the course of employment.

Kansas law has adopted the general rule that if an employee is performing work which has been forbidden, as distinguished from doing his work in a forbidden manner, he is not acting in the course of his employment.[17] Conversely, it is equally recognized that if work is performed in a forbidden manner, an employee is still acting in the course of his employment.[18] Here, claimant was performing his job in a forbidden manner when he was injured and, therefore, he broke his leg in the course of his employment.

Claimant's trip to the lumberyard and later to his home had little to do with coaching Mr. Jacobs and would not have been made if claimant did not have personal tasks to complete. The primary purpose of claimant going to the lumberyard and to his home was to get a head start on repairing his roof. He testified that it was his intent to begin repairing the roof after his shift was over and Mr. Jacobs had left. Claimant's testimony that the reason he climbed the ladder and tore plastic off the window was to give claimant something to pick up is not credible.

Respondent had a written policy that a client who worked for an employee or board member was to be compensated. Claimant did not follow this policy when he allowed Mr. Jacobs to pick up scraps of wood and plastic. Nor did claimant indicate in his log that Mr. Jacobs came to his house and worked. Claimant did not ask his supervisor for permission in advance if Mr. Jacobs could help at the house.

Claimant failed to properly supervise Mr. Jacobs. Claimant asserts that when he was on the ladder, pulling plastic off the window, he was able to see Mr. Jacobs through the window. Leaving someone with the mental capacity of a seven-year-old in a room alone, while working outside on a ladder near a window to the room while performing a personal task, does not constitute proper supervision. Admittedly, part of claimant's duties was to help Mr. Jacobs become assimilated into the community and teach him the activities of daily living. However, climbing a ladder and pulling plastic from a window while Mr. Jacobs picked up the plastic did little, if anything, to assimilate Mr. Jacobs into the community or teach him a useful daily activity.

When he climbed the ladder to remove the plastic, claimant substantially deviated from his normal job duties. Mr. Jacobs received no benefit from claimant climbing the ladder. Moreover, claimant was abandoning his duty to supervise and protect Mr. Jacobs. In essence, claimant abandoned his normal job duties and engaged in a personal activity.

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[17] *Hoover v. Ehrsam Company,* 218 Kan. 662, Syl. ¶ 2, 544 P.2d 1366 (1976).

[18] *Servantez v. Shelton*, 32 Kan. App. 2d 305, 81 P.3d 1263, *rev. denied* 277 Kan. 925 (2004).

As Mr. Jacobs' coach, claimant could have engaged in any number of approved activities. Instead, claimant engaged in an activity of personal risk that resulted in an accident and injury that further compromised claimant's ability to supervise Mr. Jacobs. The Board finds that claimant's injury did not arise out of his employment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[19] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

CONCLUSION

Claimant failed to prove by a preponderance of the evidence that his accident and resulting injury arose out of his employment with respondent.

AWARD

WHEREFORE, the Board affirms the October 31, 2011, Award entered by ALJ Klein.

IT IS SO ORDERED.

Dated this ____ day of April, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[19] K.S.A. 2011 Supp. 44-555c(k).